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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Pulsafeeder, Inc.

Serial No. 78377288

Dennis A. Gross of The Hill Firm for Pulsafeeder, Inc.

Zhaleh Delaney, Trademark Examining Attorney, Law Office 116
(M.L. Hershkowitz, Managing Attorney).

Before Hairston, Walters and Drost, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

Pulsafeeder, Inc. has filed an application to register
the mark OMNI in standard character form on the Principal
Register for "mechanical diaphragm metering pumps used in
chemical metering," in International Class 9.¹

The Trademark Examining Attorney has issued a final
refusal to register under Section 2(d) of the Trademark Act,
15 U.S.C. 1052(d), on the ground that applicant's mark so

¹ Serial No. 78377288, filed March 2, 2004, based on an allegation of a
bona fide intention to use the mark in commerce. Applicant submitted an

resembles the two marks shown below, owned by the same party and previously registered for the goods noted, that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.



- Flow measurement and control computers for the measurement of liquid hydrocarbon and gas flows, in International Class 9.²

OMNICOM

[standard character form]

- PC-based computer software used to communicate with devices for the measurement of liquid and gas flow, in International Class 9; and
- Computer program user manuals for use in communication with devices for the measurement of liquid and gas flow, in International Class 16.³

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We reverse the refusal to register.

Regarding the marks, the examining attorney contends that the literal portions of the respective marks are

amendment to allege use on June 10, 2005, alleging first use and use in commerce as of May 2, 2005. The amendment to allege use was approved.

² Registration No. 2698971, filed on June 11, 1993 and issued March 25, 2003, to Omni Flow Computers, Inc.

³ Registration No. 1833697, filed on November 13, 1992 and issued May 3, 1994, to Omni Flow Computers, Inc. (Renewed for a period of ten years.)

identical or highly similar; and that the word "omni" is dominant in both cited marks, arguing that the word portion of the stylized mark is likely to be used when asking for the goods and that the "com" portion of the standard character mark, OMNICOM, will be seen as an abbreviation for "communication," which is "merely descriptive in relation to software used for communicating with devices in controlling chemical flows" (brief, p. 3).

Regarding the goods, the examining attorney contends that applicant's metering pumps and registrant's hardware and software controls for the use specified are "very closely related 'metering devices' all for use in controlling presumably the same chemical flows" (brief, p. 4).

The examining attorney submitted excerpts of articles retrieved from the Lexis/Nexis database to support the contention that some metering systems integrate pumps and electronic controllers in a single unit for chemical control. The examining attorney searched the Nexis database for uses of "software" within 50 words of "metering pump" and found six references, of which five were submitted, although two of the references are essentially the same and consist merely of a headline in a publication entitled *Hydrocarbon Processing*. The remaining excerpts are also so

short as to preclude us from drawing any conclusions about the goods involved herein.

The examining attorney submitted copies of four third-party registrations and excerpts from two third-party Internet websites to support the contention that metering pumps and electronic controllers emanate from the same source. One of the registrations includes "metering pumps" and "electronic controllers," but the electronic controllers appear to be limited to a use unrelated to the metering pumps; and three registrations, two owned by the same company, include both electronic controllers and metering pumps for liquid chemical processes. One of the Internet websites, referring to a company named Liquid Metronics Incorporated (LMI), describes its metering pumps, controllers and accessories used in monitoring water quality. It refers to its controllers that contain software developed and apparently owned by another company, emWare, for communication with other devices in the system. Another excerpt from a website referring to a company named Omega Engineering, Inc., describes a single product, the PHP-190 Series, further described as "chemical metering systems combin[ing] controller and pump in one unit." The price of the units shown ranges from \$1385 to \$2152.

Regarding the marks, applicant contends that the marks are not identical; that the logo design of one of the cited

registrations adequately distinguishes the marks; and that the suffix "com" in the other cited registration, OMNICODE, cannot be ignored and, in fact, distinguishes the marks.

Regarding the goods, applicant, in its brief, provides a detailed description and explanation of the nature of its goods and contends that "the goods are not the same, and are not competitive, nor are they interchangeable, substitutable or useable for the same purpose" (brief, p. 14). Applicant argues, essentially, that the examining attorney has placed too great a reliance on this one *du Pont* factor and that the examining attorney's conclusions about the relationship between the respective goods is incorrect and primarily conjecture. Applicant describes chemical metering pumps as being used to "inject chemicals in precise amounts into a process or system" (brief p. 17) such as various industrial processes and water treatment. Applicant states the following (brief, pp. 14-15):

Chemical metering pumps are ... used in many different environments and for many different purposes, and while it is possible that in some environments one of the parameters to be taken into consideration in determining the extent of operation of the metering pump, either its duration of operation, frequency or stroke length, may include information either related to the flow from the pump or to the flow of fluid in some portion of installation in which the pump is used, this does not make either computer software, program user manuals or flow measurement and control computers products related to the metering pump. In point of fact, such devices would not be used. The standard use for flow measurement in metering pump situations is to use a flow meter

which outputs a series of pulses reflecting flow past the meter sensor. Those pulses would be used as the input to the metering pump controller and no separate stand-alone dedicated computer, software or user manual would be involved.

... The registrants products, as clearly set forth in the '971 mark, relate to liquid hydrocarbon and gas flows. This is the type of equipment that would be used in pipelines, and the pumps associated with such pipelines are not diaphragm metering pumps.

While it is certainly known that chemical metering pumps, including the applicant's chemical metering pumps, can be equipped with controllers, and that those controllers, especially in this day, may include computational capabilities, that particular fact is not unique to the applicant's products, or to chemical metering pumps, but extends across substantially all areas of modern life where computational capability is a standard feature of most controllable devices.

. . .

... [f]luidic systems not only may employ pumps, they employ a vast variety of devices. This does not mean that each of those devices is sufficiently related to each of the others or to the pumps as to create a likelihood of confusion because of the use of a common word as a trademark.

Applicant contends that the record does not establish any connection or relationship between the measurement of liquid hydrocarbon and gas flows and the use of chemical metering pumps; or that the products would ever be used in the same system, in the same environment, by the same personnel, or purchased together or by the same buyers. Applicant notes that the purchasers of the respective highly specialized products are very sophisticated, highly trained technical people. Applicant's evidence consists of its specimen, a

copy of an instruction manual for its pump, which contains no information about software or electronic controls.⁴

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein. The factors deemed pertinent in this proceeding are discussed below.

We turn, first, to a determination of whether applicant's mark and the registered marks, when viewed in their entirety, are similar in terms of appearance, sound, connotation and commercial impression. The test under this

⁴ While applicant argues that OMNI is a common trademark and the subject of many third-party registrations, there is no evidence of this allegation in the record and, thus, this argument is not persuasive.

du Pont factor is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applicant's mark is OMNI in standard character form. The stylized mark in registration no. 2698971, contains a minimal design feature consisting only of a thin rectangular line around the word "omni," intersecting the capital "O" and the star-shaped dot on the "I." The font used for the word "omni" is unremarkable; the rectangular line serves merely as an outline that focuses the eye on the word "omni"; and the star-shaped dot over the "I" is of a normal proportion to the "I" and does not stand out considering the

mark as a whole. Therefore, we find that the design feature in the registered mark is of less significance to the mark's commercial impression than is the word "omni," which is identical to applicant's mark in its entirety, and the design feature in the cited registered mark does not suffice to distinguish the marks. See *In re Chatham International Inc.*, 380 F.2d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *In re El Torito Restaurants Inc.*, 9 USPQ2d 2002 (TTAB 1988); and *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

Likewise, regarding cited registration no. 1833697 for the mark OMNICODE, in terms of appearance, sound, connotation and overall commercial impression, we find that the similarity between the marks which results from the presence of the word "omni" in both marks outweighs the minor point of dissimilarity between the marks, i.e., the addition of the suffix "com" to the registered mark. We are not persuaded by the examining attorney's dictionary definition of "com" as an abbreviation of numerous diverse words, including, as number 11, "communication," either that the "com" portion of the registered mark would be perceived as an abbreviation of "communication" or, if so, that such a connotation would render the word "com" descriptive of the identified goods. However, given that the "omni" portion of the registered mark appears first as the root word and the "com" portion is a suffix, and viewing the marks in their

entireties, we find that applicant's mark OMNI and the registered mark OMNICOM are sufficiently similar because of the common term OMNI in both marks that a prospective purchaser would be likely to believe that similar goods identified by these respective marks emanate from the same or related source(s).

We turn next to the second and third *du Pont* factors, i.e., the similarity or dissimilarity of the respective services, and the similarity or dissimilarity of the trade channels and classes of purchasers for the respective purchasers. We note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their

marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. See *Shen Manufacturing Co., Inc. v. The Ritz Hotel Limited*, 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004); and *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein. Even if the marks are identical, if these conditions do not exist, confusion is not likely to occur. See, e.g., *In re Unilever Limited*, 222 USPQ 981 (TTAB 1984); and *In re Fesco, Inc.*, 219 USPQ 437 (TTAB 1983).

We agree with applicant that the mere fact that applicant's mechanical diaphragm metering pumps used in chemical metering may include electronic components that may, in turn, rely on software for operation, does not automatically make applicant's metering pumps similar or related to registrant's hardware, software and manuals for the measurement of liquid hydrocarbon and gas flows. Further, the examining attorney's contention that "chemical metering," for which applicant's pumps are used, encompasses the measurement of hydrocarbon liquid and gas flows is not persuasive in view of applicant's detailed explanation, not contradicted by the examining attorney's evidence, of the

distinct nature of the respective fields. Additionally, applicant's position regarding the lack of connection between its pumps and any particular software is supported by the fact that the previously described website excerpt from LMI specifically identifies the third-party software that it uses in connection with its chemical metering pumps. It would appear from the identifications of goods and the explanation provided by applicant, that the respective products are used for different uses in entirely different fields. We find the evidence made of record by the examining attorney to be insufficient to establish the contrary.

It is also quite clear from the record that these products are not inexpensive items purchased by ordinary consumers. By their very nature, the respective products are purchased for specific purposes by technical experts in the respective fields. Further, based on the prices noted in the record for applicant's goods, these are not inexpensive, impulse purchases.

Thus, we find that the record does not establish that the respective goods are related such that, if identified by confusingly similar marks, prospective purchasers would mistakenly believe the goods emanate from the same or related source(s). The cost of, at least, applicant's goods and the fact that the respective goods are purchased by

knowledgeable purchasers would further obviate any likelihood of confusion.

In summary, we conclude that despite the substantial similarity in the commercial impressions of applicant's mark and registrant's marks, the examining attorney has not established that their contemporaneous use on the goods involved in this case, sold to the sophisticated purchasers involved herein, is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The refusal under Section 2(d) of the Act is reversed.